In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1307

FRANK GERVATO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that a warrant to search a private dwelling may not be executed when the occupant is not at home, except when there are exigent circumstances to do so.

A two-count indictment was returned in the United States District Court for the Eastern District of Pennsylvania charging petitioner with illegally manufacturing lysergic acid amide, a depressant drug, in violation of former 21 U.S.C. 331(q)(1) and 360a(a) (now 21 U.S.C. 841(a)(1)), and with possessing that drug in violation of former 21 U.S.C. 331(q)(3)(B) and 360a(c)(2) (now 21 U.S.C. 844(a)). Petitioner filed a motion to suppress certain evidence seized from his apartment under a search warrant executed on March 24, 1971. Petitioner argued, *inter alia*, that the search

was illegal because neither he nor any "authorized person" was on the premises during the search. The district court granted the motion on this ground (Pet. App. A12-A33). On the government's appeal pursuant to 18 U.S.C. 3731, the court of appeals vacated the district court's order granting the motion to suppress and remanded the case for further consideration (Pet. App. A1-A11). Petitioner now seeks certiorari.

1. In the latter part of March 1971, agents of the Bureau of Narcotics and Dangerous Drugs learned that petitioner had purchased all the ingredients necessary to make dimethyltryptamine (DMT), a controlled drug (Tr. 6, 9-13, 16, 42, 48, 53-54, 102-103). On March 24, 1971, after petitioner had bought some dry ice, a coolant necessary for the manufacture of DMT (Tr. 11, 13, 48), BNDD agents began a surveillance between 12:00 and 1:00 p.m. of petitioner's apartment (Tr. 20, 45). At about 2:00 p.m. agent William Glanz obtained a warrant authorizing him to search petitioner's apartment in the daytime for dimethyltryptamine as well as chemicals and equipment used in manufacturing the drug (Tr. 18). At 5:30 p.m. Glanz and two chemists drove to petitioner's apartment. When they arrived, the surveilling agents told them that they did not think petitioner was inside the apartment (Tr. 20, 45). At about 6:00 p.m. Glanz knocked on the apartment door, located on the side of the building, then announced his official identity and his reason for wanting to enter the apartment. Receiving no reply, he knocked again. After a brief pause, during which he heard no response from inside the apartment, he forced open the door (Tr. 64). After entering, Glanz and the other agents[1] were met by the owner of

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[1] Six agents from the Bureau of Narcotics and Dangerous Drugs and one police officer executed the warrant; the two chemists were there as advisors (Tr. 62).

the building and two young men, who had entered through a door connecting the apartment with a delicatessen behind which the apartment was located (Tr. 22, 67). The building owner was present during the entire three-hour search which followed (Tr. 25). The agents initially searched the premises with flashlights, hoping that petitioner would return to the premises (Tr. 68-69). At 9:10 p.m., after the search was completed and seventy-eight items had been seized, petitioner arrived home (Tr. 28-33, 124).

Although the district court stated that it did "not believe that there was any mischievous intent on the part of the officers who served the warrant" (Pet. App. A28), it held that the warrant should not have been executed in petitioner's absence.[2] The court concluded that "[a] man's home should not be forcibly entered in his absence to serve a search warrant, absent some exigent circumstances which it is up to the Government to show, especially in a case such as this where the house was under surveillance and the agents knew before going to the door that no one was home" (Pet. App. A28).

2. In an opinion on which we rely here (Pet. App. A1-A11), the court of appeals properly rejected the ruling of the district court as a novel and unwarranted restriction on the use of search warrants. After examining the historical rationale behind the search and seizure provisions of the Fourth Amendment (Pet. App. A3-A6), the court concluded that the primary purpose of the Amendment is "to protect against warrantless searches

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[2] The district court assumed that "the warrant was valid and was validly executed as regards the time of day and the scope of the items seized" (Pet. App. A13).

and seizures and those conducted under an indiscriminate general authority. There is no indication that the Founding Fathers were also concerned that the power to search should be dependent on the presence of the occupant" (Pet. App. A7). The court observed further that neither this Court nor any appellate court has ever suggested that the occupant of the property searched must be present while a warrant is executed. As the court also noted (Pet. App. A7), there is no such mandatory requirement contained in Rule 41, Fed. R. Crim. P.; on the contrary, that Rule provides in part that an inventory "shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, *if they are present* * * *" (Rule 41(d); emphasis supplied). In rejecting the argument that the absence of the occupant substantially increases the possibility of a general search or pilferage, the court held that adequate protection against abuses is provided by the requirement for judicial supervision prior to issuance of the warrant (Rule 41(e)), restrictions on execution to certain civil officers (Rule 41(c) and 18 U.S.C. 3105), and the requirement of an inventory made in the presence of the occupant or in the presence of at least one credible person other than the applicant for the warrant (Rule 41(d)) (Pet. App. A9-A10). Finally, the court noted that the presence of the occupant at the commencement of a search of a house will not significantly deter pilferage or a general search if that is the intent of the agents (Pet. App. A10). In light of these considerations, the court of appeals correctly concluded that the search in question was valid under the Fourth Amendment.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1973.